Comment on Recent Cases

AGENCY: POWER OF ATTORNEY OF A MINOR VOID:—Perhaps all questions concerning the validity of a power of attorney given by an infant have been so definitely settled by the legislature in California that there is no occasion for decisions on the point by the courts. However, in a recent decision of the Supreme Court of this state, in the case of *Hakes Investment Company* v. *Lyons,* it was announced by way of dictum that a power of attorney given by an infant was absolutely void.[1] As pointed out by the court in the course of its opinion there is a great conflict of authority on the question whether such power should be void or merely voidable. The rule in California before the adoption of the codes made it voidable.[2]

In 1872 section 33 of the Civil Code was enacted as follows: "A minor cannot give a delegation of power." In 1874 the section was amended by the addition of further prohibitions upon his powers.[3] Subsequent sections of the same code[4] give the infant power to make all other contracts subject to his power of disaffirmance.

In the face of the modern tendency in most jurisdictions there is but little reason for the California rule that every delegation of power by a minor is void. The strongest arguments in favor of it are that the infant should be protected in his property rights,[5] and that where a general power is given, by affirming one transaction under the power he affirms all other acts done under it, thereby cutting off his right of disaffirmance.[6] This last statement rather overemphasizes the consequence of an affirmance of one act done under a general power and besides many cases arise in which the minor gives an authority to do but a single act.

The strongest argument in favor of holding the power voidable is that an infant should be allowed to do by an agent what he can do himself. As pointed out by Mitchell, J., in a Minnesota case:[7] "On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing

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[1] (Dec. 16, 1913) 46 Cal. Dec. 538. See also In re Cahill, (1887) 74 Cal. 52 at 56.

[2] Hastings v. Dollarhide, (1864) 24 Cal. 195.

[3] See 33. A minor cannot give a delegation of power nor under the age of eighteen make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control.

[4] California Civil Code, secs. 34 and 35.

[5] Oliver v. Woodroffe, 4 M. & W. 650; Waples v. Hastings, (1842) 3 Harrington (Del.) 403; Craig v. Bebber, (1890) 100 Mo. 584, 18 Am. St. Rep. 629; Mechem on Agency, sec. 53.

[6] Tucker v. Moreland, 1 Am. Leading Cases, 5th ed. 247 note, 31 Cyc. 1208, cases cited and note.

[7] Coursolle v. Weyerhauser, (1897) 69 Minn. 328, 72 N W. 697.

as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable." In this he is sufficiently protected in all of his property rights by his right of disaffirmance. On the other hand, the interests of third parties dealing with minors should not be made unnecessarily burdensome by making all of their acts done through agents absolutely void.

It is therefore suggested that our law on the subject of minors' powers and minors' obligations generally would be greatly improved by amending section 33 of the Civil Code. As changed the section should provide that a minor under the age of eighteen cannot directly or by a delegation of power make contracts relating to real property or personal property not in his immediate possession, etc. In all other cases as provided in sections 34 and 35 of the same code, he should be allowed to act directly or through an agent. We feel that the attitude of the courts in other jurisdictions and of our own court before the adoption of the code is preferable to the rule of the legislature. It has been held in this state that where an infant appeared by attorney and not by guardian and judgment was given against him that such judgment was merely voidable and not void.[8]

M. C. L.

ASSAULT AND BATTERY: OPERATION BY PHYSICIAN WITHOUT CONSENT OF PATIENT.—Proceeding from the premise that one of the most fundamental rights of a free citizen is the right to the inviolability of his person, the courts have established the general rule that a physician cannot perform a surgical operation upon the body of a patient unless the act be duly authorized. There seem to be two sets of circumstances, however, from which consent by the patient may be implied: First, in a case of sudden or critical emergency, e. g., where a person has been rendered unconscious in an accident, a physician is justified in giving such medical or surgical treatment as may reasonably be necessary for the preservation of life or limb.[1] Second, if, in the course of an operation to which the patient has consented, the physician discovers conditions not anticipated before the operation was commenced, and which if not removed would endanger the life or health of the patient, he is justified in extending the operation to remove and overcome those conditions.[2] But he is not justified in performing a totally different operation.[3]

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[8] Childs v Lauterman, (1894) 103 Cal. 387, 37 Pac. 382 42 Am. St. Rep. 121.

[1] Pratt v. Davis, (1905) 118 Ill. App. 161, 165; Mohr v. Williams, (1905) 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303

[2] Bennan v. Parsonnet, (1912) 83 Atl. 948.

[3] Mohr v Williams, supra; Pratt v. Davis, (1906) 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609.